THE CIGI-YORK INITIATIVE

SECOND REPORT OF THE "PANEL OF REPRESENTATIVES"[1] TO OSGOODE FACULTY COUNCIL CONCERNING THE PROTOCOL TO PROMOTE AND PROTECT ACADEMIC FREEDOM

JANUARY 18, 2012

The purpose of this report is to advise Faculty Council on an urgent basis about recent developments regarding the proposed protocol and associated documentation on which Faculty Council's conditional approval of the initiative has, to date, been founded. We may report further prior to the next Faculty Council meeting on February 6, 2012 and are of course happy to respond to queries or concerns.

The panel has prepared this report and otherwise carried out its role as part of its mandate from Faculty Council to (a) work in collaboration with the Dean to communicate with the parties to the original CIGI-York Agreement of August 2011 (the August Agreement), on request, to clarify/ explain the choice of language in the Protocol, (b) respond to any concerns those parties might have with the language and consider any alternative language that the parties might propose, and (c) report to Faculty Council on these matters, subject in all cases to final approval by Faculty Council of any changes to the Protocol and, in turn, of the initiative. We stress that our ultimate role, as we understand it, is to report to Faculty Council and not to negotiate on its behalf, especially where confronted with proposals that we think would weaken significantly the content of the protocol.

Background and conclusions

As outlined in our report to Faculty Council of January 6, 2012 (mis-dated 2011), since early December we have been engaged in a constructive and much appreciated dialogue with Dean Sossin regarding the protocol. In the course of this dialogue, we have expressed agreement to various changes and disagreement with others. We are grateful to the Dean for his efforts in this process.

On Monday, January 16, the panel received from Dean Sossin the University's "final position", as it was described to us, on a proposed dispute settlement mechanism and side letter. The panel also received additional changes to the protocol proposed by CIGI. The Dean also advised the panel to expect another change from CIGI on "how to recognize the Steering Committee's important role in non-academic aspects of the collaboration". The panel has not received a reply from CIGI to its proposals on dispute settlement/ enforcement options, and does not at this stage anticipate any reply.

[1] The panel members include Thomas Wilson and Professors Carys Craig, Giuseppina D'Agostino, Francois Tanguay-Renaud, Gus Van Harten, and Stepan Wood.

We do not see it as our role to disclose these proposed changes or their detailed rationales to Faculty Council and leave this to the Dean's discretion. **We emphasize also that the Dean may have a different perspective on various aspects of this report and do not wish to pre-empt in any way his own opportunities to address Faculty Council.**

The panel members studied and discussed the proposals from CIGI/ York and reached a shared view that, while CIGI/ York appear willing to commit to a strongly-worded protocol, either or both parties were not prepared to make the commitments enforceable in a meaningful way. In our view, this is not a minor or technical issue but rather pervades the protocol and initiative as a whole. Indeed, the issue appears to undermine all of the clarifications and commitments that have been made in relation to the initiative since discussions about the August Agreement began at Faculty Council.

Based on this, and having elaborated at length our views and suggestions in earlier communications with the Dean, we have advised the Dean that we regard the position of CIGI/ York as incompatible with a strong protocol, although we remain open to any further proposals that meet the protections which we have presented, clearly and repeatedly, as a required floor.

Reasons for conclusions

The background for the panel's discussions with the Dean since December, and the content of those discussions, have been very involved. We cannot at this stage provide a comprehensive outline on all aspects, but will be pleased to respond to queries from Faculty Council members. The following is a non-exhaustive summary of our key concerns, arising from the recent proposals from CIGI/ York.

A. York's proposal has indicated that it will not agree to a meaningful enforcement mechanism in the protocol

York's rejection, as we see it, of a meaningful enforcement mechanism in the protocol has a number of elements that are summarized here. First, York's proposal is based on removal from the original protocol of the following provisions:

> …. York University undertakes to enter into negotiations in good faith with OHFA, upon request by OHFA, to strengthen the provisions on academic freedom in the existing collective agreement between York University and OHFA in order to ensure that Osgoode Hall Law School faculty have equivalent substantive and procedural protections of academic freedom to those enjoyed by other York University faculty (clause 9).
>
> …. Faculty Council and faculty are recognized as parties with rights or interests related to the initiative that are protected by this protocol and the Agreement. Where Osgoode Hall Law School is of the view that this protocol has been breached by a party to the Agreement, Osgoode Hall Law School may initiate the dispute resolution process that is

laid out primarily in clause 34 of the Agreement in order to resolve the dispute (clause 34).

The panel was open to various changes or clarifications to these provisions. However, the basis for the panel's agreement to this has now been withdrawn by York as outlined below.

Second, York's proposal indicates that it will not make binding its proposed commitment, in a side letter, to an arbitration mechanism based on the York-YUFA (York University Faculty Association) model. York has, in particular, rejected a clause allowing OHFA to refer the issue of arbitration to a neutral third party for a binding resolution, as follows:

> … If OHFA requests to enter into such negotiations and York University and OHFA do not, by June 30, 2012, reach a mutual agreement on the appropriate terms of the substantive and procedural protections, then OHFA may refer the matter to a third party selected by the Chief Justice of Ontario, or if he or she is unavailable by the Associate Chief Justice of Ontario, who shall decide upon an appropriate procedure to add to the York-OHFA collective agreement (based on the model of the arbitration provisions contained in the collective agreement between York University and the York University Faculty Association (YUFA), but incorporating a single-arbitrator rather than a three-arbitrator panel) as appropriate to the circumstances of OHFA….

The panel had understood, prior to Monday, that the inclusion of this language in a side letter from York to OHFA was agreed. The panel had sought to include this clause, from an early stage, after a panel member – in response to a request from the Dean for ideas on how to clarify and strengthen the protocol's dispute settlement language – obtained input from an expert in labour law, Paul Cavalluzzo. Mr. Cavalluzzo has confirmed that York's proposal regarding this clause would make York's commitment to arbitration non-binding.[2]

Third, York's proposal indicates that it will not agree to any of a range of options presented by the panel that would make the protocol enforceable in clear terms. Instead, York has proposed including the following language: "The terms of this protocol are subject to enforcement under the laws of Ontario", and the Dean has indicated to the panel that this clause makes explicit that the protocol is intended to be enforceable through the courts. Our reading of this language, with the greatest of respect, is that it does not make explicit that the protocol is enforceable in the courts. Rather, the language may make the protocol enforceable in the courts (by CIGI or York only), but is open to an argument – based on surrounding language – that the protocol is enforceable only via the commercial arbitration process in the August

[2] Various aspects of the panel's proposals and analysis are based on input from Paul Cavalluzzo, as mentioned in our report of January 6. The panel has not received a reply to its suggestion to the Dean that it might be useful to seek a legal opinion (perhaps jointly between OHFA and Osgoode) on technical aspects of the protocol, especially on dispute settlement.

Agreement and that the jurisdiction of the commercial arbitrator is limited to non-academic matters not engaged by the protocol.[3]

The obvious point is this: if the intent is to make the protocol enforceable in the courts, then this should be made clear. Notably, York's proposal, based on what we see as unclear language as quoted above, comes after various requests from the panel to include clear language in the protocol on its enforceability, as laid out in our report of January 6, 2012.[4]

Simply put, we concluded that York's proposal would leave members of the Osgoode community dependent on CIGI's willingness to enforce York's commitments and on York's willingness to enforce CIGI's commitments. Also, attempts to develop the option of indirect enforcement of the protocol, via a side commitment to arbitration by York, have not been successful because York is unwilling to make such a commitment binding.

B. Wider concerns about possible threats to academic freedom

The panel's close attention to ensuring strong protections of academic freedom is not an idle concern, as indicated by the following information.

- CIGI and associated University administrations were the subject of findings in a CAUT (Canadian Association of University Teachers) report of 27 September 2010 on the termination of Dr. Ramesh Thakur as director of the Balsillie School of International Affairs (which is affiliated with the University of Waterloo, Wilfred Laurier University, and CIGI). These include the following (p 21-22):

  > Dr. Thakur was unfairly treated in the months leading up to his dismissal as Director of the BSIA….
  >
  > Dr. Thakur had every right to expect support from the Presidents of UW and WLU and their designates when he sounded the alarm on CIGI's proposals for tri-partite partnership on the BSIA. Insofar as his academic freedom depended on the protections of institutional autonomy, it became increasingly vulnerable to threats from the outside and complicity on the inside. UW and WLU misled Dr. Thakur about their commitment to his Directorship of BSIA and buckled under pressure from CIGI, possibly in the form of a threat to walk away from multiple commitments after ten years (as it is contractually entitled to do) and thus leave two overextended universities and their public funders to clean up the mess.

[3] Our understanding on this specific point was also confirmed with Mr. Cavalluzzo. Notably, it is our understanding that clarifying language on limiting the jurisdiction of the commercial arbitrator to non-academic matters had been agreed and remains uncontroversial.

[4] With these requests, the panel also sought provisions to ensure limited participatory rights by OHFA on behalf of Osgoode faculty, whether in the protocol or a side letter. York's proposal does not incorporate any of these provisions.

Dr. Thakur's freedom to pursue his intellectual work on topics of his own choice, in the ways he deems most productive, and in collaboration with the scholars he feels most appropriate, was unfairly constrained by the Schedule "A" Release he was required to sign in order for CIGI's remaining funding of the ARC project to flow.

Dr. Thakur's personal and academic reputation has been unfairly damaged, but not as much the reputation of CIGI, UW, and WLU…. Meanwhile, the future of the BSIA remains in doubt while there is still a possibility that its new governance structure (still being worked on) will leave CIGI present at discussions where it should not be.

Members of independent think tanks may be inescapably subject to the whims of the donors who fund them in whole or in part, though that will surely sabotage any reputation for independence such tanks aspire to; but members of academic entities hosted by universities must function free from such whims, vagaries, and pressures.

It is our understanding that CIGI objects to all or some of these findings. However, to our knowledge, CIGI has not provided any formal written reply to the CAUT report.

- In light of the above, the panel members considered hypothetically: what would happen if the CILGE director or a faculty member or student expressed a concern that interventions by CIGI threatened their academic freedom or Osgoode's autonomy? What would happen if this concern was not thought to have been addressed by the Osgoode or York administration, as was reportedly the case for other University administrations in Dr. Thakur's case?

  There are presently two scenarios based on proposals currently in play.

  - "Option 3" as proposed by the panel,[5] and reflecting a significant compromise by the panel, envisioned a protocol that was enforceable between CIGI and York, combined with a binding commitment by York to an arbitration mechanism between York and OHFA (through which CIGI's obligations could be enforced indirectly). Based on this option, the person in question would likely be directed to OHFA, which would take up the issue with the Osgoode and York administrations. If an agreeable outcome was not reached, OHFA could resort to arbitration against York for its or CIGI's alleged breach of the protocol. This is a relatively weak option because OHFA has no resources, meaning that an arbitration would need to be funded by the affected person or by voluntary contributions. Consequently, the panel's preferred option was to permit OHFA to seek enforcement of the protocol directly in the courts. Nevertheless, this indirect enforcement option would at least provide some

[5] Please see our report of January 6 for details.

mechanism by which to challenge any egregious encroachment on the protocol by CIGI/ York.

- Based on York's final position, the faculty member could approach OHFA, but OHFA would be able to pursue arbitration only if York followed through with its voluntary commitment to such an arbitration mechanism, and only then on terms voluntarily agreed by York. The faculty member could alternatively approach the Dean or York University, but would be dependent on York's willingness to take a stand against a major donor to the University. Even then, York would be in a somewhat questionable position regarding resort to the courts in order to enforce the protocol, based on unclear enforcement language in the protocol itself.

While members of the panel had different views about the first scenario, we share a fundamental concern that the second option is untenable. It suggests that CIGI/ York may be simply unwilling to agree to an enforceable protocol.

This, we think, may undermine the basis for a trusting relationship over the course of the initiative and could set the stage, if the initiative were to proceed, for a range of potential disputes over CIGI's role, apparent encroachments on the protocol, etc. Most importantly, it would be inconsistent with the principles of academic freedom, etc. that have motivated the effort to bring colleagues together in support of the initiative, based on a clear floor of protections for faculty and for the Osgoode community.

- It is our understanding that a document aimed at addressing concerns of Waterloo and Wilfred Laurier faculty, arising from their universities' relationship with CIGI and the implications for academic freedom and autonomy, has been under discussion for about two years and has undergone over 20 drafts.

C. Other concerns

Various other concerns have arisen for panel members in light of the recent proposals from York/ CIGI. However, we have not given them close consideration due to the fundamental nature of our concerns about enforcement. Some of these other concerns, also potentially fundamental, are outlined below in order to provide further context for our conclusions stated above. That said, these are not intended to provide any firm position and would have required further discussion.

- **Preservation of CIGI's right to block budget/ withdraw funding**: The panel had proposed at an early stage to make clear in the protocol that the Steering Committee could block approval of the budget submitted by the CILGE Executive Director based only on consensus of the Steering Committee members. This would address the concern that CIGI's control of the purse strings could be used as leverage against faculty, students, etc. The panel's understanding was that this change was agreed, as indicated in our report to Faculty Council on January 6. On Monday, the panel was informed that CIGI prefers not to include

this clarification. The effect is to maintain CIGI's right, based on clause 9 of the August Agreement, not to extend funding following non-approval of the budget by any of CIGI's members of the Steering Committee.

- **Apparent dilution of remedial language for the "indirect enforcement" option**: York's proposal excludes the underlined portions of the following proposed language in a side letter between York and OHFA:

> Pursuant to this procedure, an OHFA member or OHFA itself may bring forth a complaint alleging, among other things, that York University has breached the protocol or has failed to respond appropriately to an alleged breach of the protocol by CIGI. If the complaint is found to have merit – <u>including in, but not limited to, circumstances where funding for the initiative was withdrawn or withheld by CIGI in any way that related to or affected academic freedom or academic integrity</u>, then York University may be ordered by the arbitrator to provide an appropriate remedy to Osgoode Hall Law School, OHFA, and/ or any affected Osgoode faculty member(s), staff member(s), or student(s) <u>including, where funding was withdrawn or withheld, the provision of an amount of funds to Osgoode Hall Law School that is equivalent to the funds that were withdrawn or withheld</u>."

  Before Monday, the panel had understood that this proposed language was agreed, subject to resolution of other outstanding issues. The proposed language had been developed as an alternative to the more direct option of identifying OHFA as a party that could enforce CIGI's obligations under the protocol. The panel has not yet had an opportunity to research implications of York's proposed change, although it appears to dilute the remedial protections that would be available to an arbitrator in the event that CIGI withdrew funding in breach of the protocol.

- **Questionable comparisons to other York faculty:** York appears to have become focused of late on the question of whether the protocol could grant to Osgoode faculty any status or rights beyond those of other York faculty, as represented by YUFA. The panel would have been prepared to study and work through this issue further, had it been raised earlier in our discussions. That said, the issue does not appear central to the discussions because options put by the panel to the Dean, as outlined in our report of January 6, did not require adding OHFA as a party to the protocol. More broadly, York's position in this respect raises other potential concerns, including the following:

  - The panel is not in a position to know the status of other York faculty in relation to other programs and initiatives entered into by York. However, the initiative appears unique in light of its size and scope. The President appeared to indicate as much to Faculty Council when he described the initiative as charting a new course for the University. In this context, it seems unavoidable that protections extended to Osgoode faculty in the protocol might not presently have comparators among other York faculty.

- The comparison to other York faculty was mentioned in the original protocol as a basis for designing safeguards of academic freedom for Osgoode faculty, especially as envisioned in the proposed side letter between York and Osgoode. York now appears to view the status of other York faculty as a ceiling for the protections that Osgoode faculty can enjoy under the protocol as a whole.

- It is perhaps inapt to compare the position of OHFA and YUFA members, given that the latter have a statutorily certified organization with extensive resources, and that they have a right in their collective agreement (article 17) to object, including via binding arbitration, to changes to their terms of employment arising from an agreement between York and a third party. As such, if other York faculty can be said not to have a similar status to that proposed for Osgoode faculty under the protocol, then this may simply be the result of YUFA not having agreed to any initiatives of the sort currently before Faculty Council.

- **Institutional autonomy as a bar to a binding commitment on arbitration:** As a reason for not making its commitment to side arbitration binding, York has indicated that it cannot subject matters of academic governance to a third party outside of the university. This line of reasoning was introduced originally by the panel in an effort to support a strong protocol, by precluding a commercial arbitrator – chosen by CIGI and York – from ruling on or overriding the protocol. York now employs this rationale in order to avoid making a binding commitment on York-OHFA arbitration. Yet, a York-OHFA arbitration mechanism would by definition give a third party arbitrator power over matters relating to academic governance, as in the case of the existing York-YUFA arbitration mechanism. Also, if it is the case that the protocol is intended to be enforceable in the courts, as the panel has been informed by the Dean, then a third party (the judge) would obviously have powers over such matters. For these reasons, we have found York's explanation to be unconvincing.

- **Choice of language with possible OHFA implications:** Faced with a proposal to refer to the existing York-OHFA agreement by its title of "memorandum of agreement" rather than the more generic "collective agreement", a panel member was informed that this could be interpreted to mean that the University does not recognize OHFA as the bargaining agent for Osgoode faculty, in spite of past evidence of such recognition including in language in the original protocol. The panel did not discuss this aspect or form any position on it. However, because it appeared to have possible implications for Osgoode faculty in relation to the initiative, a clarification has been sought from the Dean on the issue.

In summary, we feel obliged to report, with considerable disappointment, our conclusion that the currently proposed protocol and related agreements no longer represent sufficiently strong commitments by York/ CIGI to protect academic freedom and to honour other commitments made to the Osgoode community since August.

In this respect, we recall the Dean's earlier statements to Faculty Council that this initiative will not proceed without broad-based faculty support. We do not wish in any way to pre-empt the discussion or decisions of Faculty Council. However, it is our understanding that the promise of a strong protocol was a condition of broad-based support for the initiative by the Osgoode community, in which case the absence of such a protocol may provide a strong basis on which to bring together members of the Osgoode community in a respectful and principled rejection of the initiative.

Finally, we wish to express our gratitude to Dean Sossin for his efforts to arrive at a workable arrangement, even if in our view they have not at this point met with success. We are aware that the Dean as much as ourselves has expended a great deal of time and energy on this process, with a shared aim to protect and advance the interests of the Osgoode community.